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Brf. of Goulder & Masten for Resp.

Filed May 9, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 12, Original, October Term, 1899.

Ex Parte in the Matter of

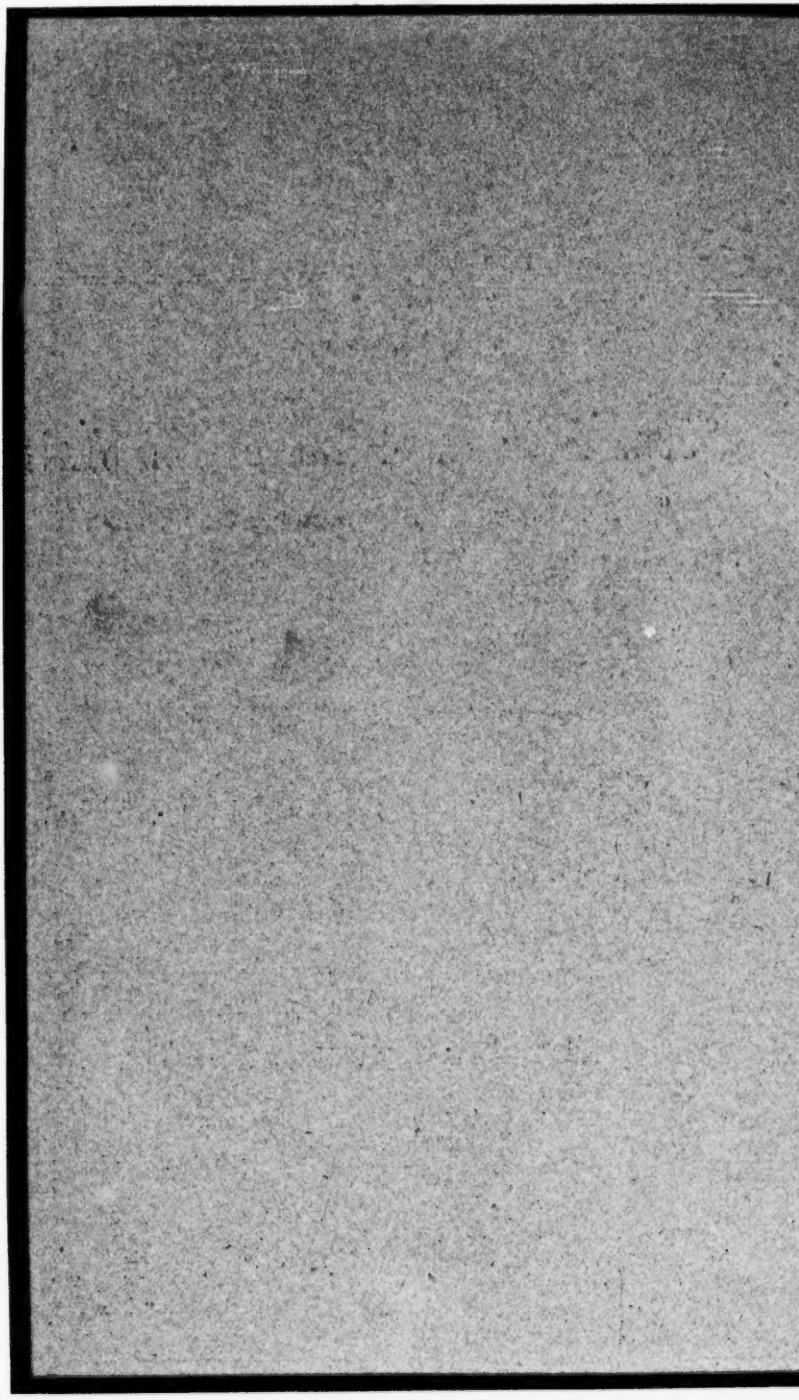
THE UNION STEAMBOAT COMPANY,

PETITIONER.

Brief for Respondent.

S. H. HOLDING,
F. S. MASTEN.

HARVEY D. GOULDER,
for Respondent



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EX PARTE IN THE MATTER OF
THE UNION STEAMBOAT COMPANY,
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BRIEF FOR RESPONDENT.

The return made by the District Court fully and concisely states the ground of his action and reasons why the prayer of the petition ought not be granted. A statement of facts would be but a repetition of the return, which seems unnecessary except in connection with the consideration of the points raised by the petition and return, which are as follows:

I. The rate of interest.
II. The costs in the United States Circuit Court of Appeals.
III. The division of damages to the ships and the payment of the cargo damage.

I.

The Rate of Interest.

The language of the mandate that the decree should be

"With interest at the same rate per annum that decrees bear "in the courts of the State of Michigan,"

is susceptible of but one interpretation. The statutes set up in the return show that decrees in the Michigan Courts bear interest at the rate of seven per cent. The question is fully discussed in the brief filed by Mr. Canfield and will not be reargued here.

II.

The Costs in the United States Circuit Court of Appeals.

Respondent's decree provides that

"the said libelant recover of the said claimant and its surety "$276.75, as one-half of the costs of said cause in the Supreme "Court, and also one-half of all costs of said cause in this court "and in the United States Circuit Court of Appeals for the "Sixth Circuit."

The language of the mandate is:

"the claimants of the Conemaugh and the claimant of the "New York each to pay one-half of all costs in this cause. "And that the said Erie & Western Transportation Company "recover against the Union Steamboat Company $276.75 for "one-half of the costs herein expended and have execution "therefor."

The decree entered accords literally with the direction of the mandate.

When it comes to payment of costs, if Petitioner has paid all of the costs in the United States Circuit Court of Appeals, the Erie & Western Transportation Company's recovery may be reduced by an amount equivalent to one-half of said costs. The costs must be settled in court; the court has power to and would adjust the amounts. A deduction of the excess from Libelant's recovery in its own right, or remitter by Libelant after payment, fully meets any question of the character, and a writ of mandamus is unnecessary.

III.

The Division of Damages to the Ships and the Payment of the Cargo Damage.

The damages, as shown for convenience in the stipulation filed by proctors for the New York, are as follows, interest being included to July 3d, 1896:

Erie & Western Transportation Company, Libelant, Damage to Conemaugh....		$30,508.46
Erie & Western Transportation Company, Trustee, Damages to its *cestuis que trust*, underwriters on cargo who did not intervene and appear in their own behalf.....	$19,627.67	
The four underwriters who intervened after the trial in the District Court.....	19,841.56	
Total damage to cargo	$39,469.23	
Union Steamboat Company, Claimant, Damage to New York.....		$4,341.80

Neither the opinion nor mandate of this court deal with amounts. They have to do only with the rights of the different parties and interests.

The mandate directs the court

"to enter decree in conformity with the opinion of this court."

Looking to the opinion, it finds both vessels in fault and specifically directs that the underwriters on cargo are entitled to recover against the New York the full amount of their damage, notwithstanding the Conemaugh may also be at fault for the collision. Thereupon a decree against the New York for the full amount of the damage of the underwriters on cargo in the sum of $39,469.23 was entered; and as to the claims of the owners of the two vessels, respectively, $30,508.56 and $4,341.80, the court divided these damages and decreed in favor of the Erie & Western Transportation Company for $13,083.89.

In view of the fact, as will be more fully presented, that there was really no cross-libel in this case, it may be questioned whether in this feature of the decree the court should not have ignored the New York's damage and given a decree for half the damage to the Conemaugh without diminution; but this is a matter of which the Petitioner cannot complain. Subject to this criticism of the decree, the rule of division was applied to the only damage that can in any sense be said to have been presented or litigated in this cause so far as either the Conemaugh or her owner in its own right are concerned.

We submit, also subject to this criticism, that the action of the District Court follows the mandate and opinion of this court, which contains no direction warranting any other action. For that court to have gone further and sought to impose either upon the Conemaugh, which is not and never has been a party to the suit, or upon her owner, which never has been in this case charged with any liability in respect to cargo damage, would have been outside of the mandate and unwarranted either by the mandate, by the opinion of this court, or by the pleadings in the case.

Proctors for Petitioner presented to the District Court a form of decree claimed to be in conformity with the opinion of this court and as required by the mandate, but which plainly fails in these

respects; and now, not insisting on this form of decree, the Petitioner is in the position of seeking under writ of mandamus, not the ministerial execution of the mandate and opinion of this court upon the case which was tried, but to secure affirmative relief never heretofore claimed or set up in the manner prescribed by law and the rules of practice.

Baldly stated, the Petitioner now for the first time suggests that this court declare an abstract general proposition of law and give the Petitioner the benefit of the result, regardless whether it is applicable to the facts in the case or whether it affects a trustee or its *cestuis que trust*, and this even though it should result in the rendition of a judgment for a large sum against a party who has not been heard.

We respectfully submit that this is not the office of mandamus, and that a sufficient answer to the question why a decree was not entered dividing the entire loss between the Erie & Western Transportation Company and the New York is found in the fact that such a question has never been litigated in this case; that no basis has ever been furnished for litigation or decision of that question; that as to that loss, the Erie & Western Transportation Company which has a perfect defense to any such claim in behalf of the underwriters on cargo, was never a party, was never charged with any liability and never given an opportunity to set up its defense. So far as the Conemaugh is concerned, she is not and never has been a party to this case in any character; even the cross-libel which asserted only the New York's own damage having been abandoned.

Following the terms of the writ, however, it becomes necessary to consider the question why a decree should not be entered which should divide between the Erie & Western Transportation Company and the Petitioner equally

"the total damages arising out of said collision."

The answer of the New York set up the fact that she had sustained some damage, and inasmuch as the decree entered does divide equally the damages sustained by the Erie & Western Transportation Company and by the Petitioner, the question may be broadly stated :

Why should not the decree provide that one-half the damage to the Conemaugh's cargo be paid by the Erie & Western Transportation Company?

From Respondent's return, the following reasons appear :

1. The cargo damage was claimed of the New York, and this Honorable Court, upon the case as made, held that the full damage was recoverable from the New York, notwithstanding the Conemaugh may also be in fault for the collision.

2. The propeller Conemaugh was not impleaded and was not before the court.

3. The Petitioner did not exercise its right to have either the Conemaugh or the Erie & Western Transportation Company made party defendant under General Admiralty Rule 59, so as to be answerable to the claim of the cargo owners or underwriters ; nor does the Petitioner's answer claim "set-off or recoupment" in respect thereof in case the New York be found in fault, or in any manner refer to that claim.

4. To charge the Erie & Western Transportation Company with one-half the cargo damage, to-wit, $19734.61, would not only recoup against its own recovery in another right a claim upon which it was never impleaded and so never had the opportunity of presenting its special defense, but would require an affirmative decree against it in excess of its own recovery, which is not directed by this Honorable Court, or permissible under the pleadings in the case.

5. If Petitioner has any right against the Erie & Western Transportation Company by reason of damage to cargo, since it was not set up, in absence of specific authority from this court, it cannot be determined in this litigation.

6. Respondent had no authority to determine the right of the Petitioner to claim against the Erie & Western Transportation Company, or to hear any special defense to such claim from the Erie & Western Transportation Company without new pleadings, for which Respondent could find no warrant in the mandate.

Upon these facts and quite aside from the opinion of the court herein, we submit, as will be more fully presented later, that the case of

The Beaconsfield, 158 *U. S.*, 303,

is decisive of the question adversely to the prayer of the petition; but answering Petitioner's brief:

The libel presented two distinct causes of action in behalf of two distinct parties.

The Erie & Western Transportation Company asserted against the propeller New York a claim in its own right for its own damage, and, as trustee, asserted an entirely distinct claim for the damage to its *cestuis que trust*, the owners of and underwriters on cargo. All of the cargo was insured so that the trusteeship is simply for the underwriters on cargo.

A cross-libel was indeed filed, which was definitely limited to the claim for damage to the New York, with the ordinary prayer for process and for security to answer the claim thereof, as provided by General Admiralty Rule 53, but no process was issued upon it, no copy of it was served, no order for security was entered or sought; the Conemaugh was never required to and never did answer it. Indeed, no proceedings whatever were had thereon except a formal dismissal by the District Court from which no appeal was taken. As far as the record in the cause shows, the cross-libel was simply filed and abandoned. The case, therefore, stands on libel and answer as if the cross-libel had never been filed.

> "Beyond doubt, the final decree dismissing the libel in the "cross-suit determines that the libellant in that suit is not "entitled to recover affirmative damages for any injuries suf- "fered by his vessel in the collision; but it does not dispose "of the issues of law or fact involved in the original suit. "Instead of that, both parties in the cross-suit, if no appeal is "taken from the decree in that suit, are remitted to the plead- "ings in the original suit; and it is undeniable that every issue "in those pleadings is open to the parties, just the same as if "no cross-libel had ever been filed."
>
> *The Dove*, 91 *U. S.*, 381, *at* 384.

Certain of the cargo underwriters intervened after the hearing in the District Court, but without affecting the issues or the status of the cargo claim; they made no new allegations, raised no new issue but simply continued in the right against the New York

asserted by libelant as their trustee, so that their right is precisely that of the other underwriters who remain strictly as libelant's *cestuis que trust.*

The rights of the cargo owners or underwriters are the same whether they appear in their own right or by trustee. The right of the ship owner to proceed as bailee and trustee against an offending ship or party for damage to cargo of his vessel has been repeatedly recognized. He may do this in an action in which he also claims damage on his own behalf, and the right so asserted in the character of trustee for the cargo interests is as perfect in behalf of the *cestuis que trust* and the relief against the party charged as extensive as if the cargo owners or underwriters appear in their own right.

A citation of authorities is unnecessary. This court has repeatedly recognized the right to so proceed, and the right of the owner so suing as trustee for cargo damage to "recover the whole damage to the cargo" in a case where by reason of contributory fault he can only recover a *moiety* of the damage to his vessel.

The Beaconsfield, 158 U. S., 303, at 307.

> "The owners of the schooner have an undoubted right to "sue on behalf of the owners of the cargo for its value. It "would seem that so suing, their rights as bailees must be as "great as if the owners of cargo joined as libelants. No final "decree should, therefore, it seems, be made which will give "the libelants a smaller amount as bailees than the owners of "the cargo would be entitled to receive."

Leonard vs. Whitwill, 10 Ben., 638; F. C. 8261.

Under the opinion of this court herein, (according with the settled law,) the underwriters on cargo have relief against the New York as the only party ever impleaded or charged in this case with that liability, to the full amount of their damage, $39,469.23. By virtue of their personal intervention, $19,841.56 of this is payable to the underwriters who intervened, and the balance, $19,627.67, to the trustee, the Erie & Western Transportation Company, but necessarily "in trust," for the underwriters on cargo who did not intervene and relieve libelant of the trust.

The Erie & Western Transportation Company has and can have no interest in this sum. It is not subject to offset or to any claim, recoupment or reduction, from any cause on account of the

Erie & Western Transportation Company; it does not belong to that company but to its *cestuis que trust*. As a trust fund it is in no way to be charged with the obligations of the trustee. Of this trust relation the Petitioner has had knowledge at every step in the case. It appears from the libel, in the computation of damage before the Commissioner, in his report and its confirmation and in the decree on the trial in the District Court. The Petitioner here sets it out definitely, in accordance with the real state of the case, by its stipulation, showing in convenient form the various items of damage, and it finally appears in the decree proposed in behalf of Petitioner.

The trust fund must be kept intact.

Division is here applicable only to the Damage Suffered by the Ships themselves.

As has been argued, the claim for loss of cargo, even though prosecuted by the owner of the carrying ship as trustee, is distinct and separate from the claim of such owner for his own damage, quite as much so as if the owner of the carrying ship had never come into the case for any purpose.

It may be stated as a general proposition that where two vessels in collision are at fault, all resulting damage should be divided or apportioned between them. Surely this is no more than a general abstract principle of law, which cannot, more than any other principle, be ruthlessly applied regardless of all forms of procedure, of the pleadings in the cause and of special circumstances which govern the application of general principles. When therefore, one ship only is proceeded against for the damage to cargo, that party charged and given his day in court in respect to the claim of liability can alone be properly decreed to pay.

> "The peculiar principle of apportioning the damages in col-
> "lision between the two vessels, when both are in fault, applies
> "only to the damages suffered by the vessels themselves. It
> "does not apply to the claim of the owner of cargo on board
> "the libelant's vessel or of the owner of a vessel being towed.
> "Where the suit is brought against only one of two vessels
> "and both are adjudged to be in fault, the libelant is entitled

"to recover in full the amount of his damages without regard "to the right of apportionment between the two vessels in "fault."

Henry's Ad. Pr., Sec. 77.

"Goods shipped as cargo, and their owners, as in the case "before the court, are innocent of all wrong; and the owners "of the cargo may sue the owners of one of the ships, or both, "and they may sue at law or go into the admiralty, at their "election, and, having proved their case, they are as much "entitled to full compensation in the admiralty as they would "have been if they had elected to pursue their common-law "remedy, saved to them by the proviso contained in the ninth "section of the Judiciary Act, 1 Stat., 77.

"Co-wrongdoers, not parties to the suit, cannot be decreed "to pay any portion of the damage adjudged to the libelant, "nor is it a question in this case whether the party served may "have process to compel the other wrongdoers to appear and "respond to the alleged wrongful act."

The Atlas, 93 U. S., 302-317.

The Continental authorities on division accord with this.

"The case of division established by Art. 10 is an exception "which is applicable to *vessels* only, without embracing mer-"chandise."

Emerigon, Chap. XII, Sec. 14, p. 334.
See ref. The Bristol, 29 Fed., at 874.

This is not an arbitrary rule but rests in justice and reason. The cargo owner is innocent of wrong, and the party in fault charged with his loss must, as to the cargo owner, pay in full. The wrong of the carrying ship is neither imputed to the cargo owner nor impressed upon his goods. If but one of several joint wrongdoers is called upon to pay, he must make compensation in full and look to the other wrongdoers for their proportion.

The Juniata, 93 U. S., 337.

The statement made in the brief for Petitioner (p. 13) that there can be no contribution among *tort feasors*, is erroneous. This in the first place overlooks the distinction between joint and concurrent *tort feasors*. The wrong not being willful, contribution may be had in a proper case. Whether and how the right may be lost is not germain to this discussion. As we shall contend, and as argued more fully later on, it was the duty of the Petitioner, which

was distinctly impleaded and charged, to bring in the Erie & Western Transportation Company or its vessel under Rule 59, if it desired to raise the question that in case of its own fault being found, a part of that damage should be charged to that Company or its vessel.

Under the last cited authority, in computing the division, only that damage is to be included which the parties themselves have suffered. Where one has been called upon to pay in full to or on account of a third person, the question then becomes one of apportionment between the wrongdoers themselves. We submit that in dividing the damage suffered by the parties themselves, and decreeing full payment to the cargo against the New York, Respondent complied with the letter and the spirit of the opinion of this Honorable Court.

An affirmative decree may not be rendered against the Erie & Western Transportation Company for the difference, between one-half of its own damage and one-half of the aggregate damage with which petitioner seeks to charge it, and petitioner may not at this stage and in the state of this case have relief by way of recoupment or otherwise.

As shown in Petitioner's stipulation, the damage of the Conemaugh is $30,508.45, of the New York, $4,341.80, of the underwriters on cargo, $39,469.23, an aggregate of $74,319.49. One-half the total damage, therefore, is $37,159.74, exceeding the damage sustained by the Erie & Western Transportation Company in its own right by $6,651.28. The decree entered by the District Court divides the damages of the Conemaugh and the New York, giving a decree to the Erie & Western Transportation Company of $13,083.33. To assess the damages equally, as prayed for in the petition herein, would require a further direct and purely affirmative decree for $6,651.28 either against the Conemaugh, not herself a party, or against the Erie & Western Transportation Company, not charged by any one with cargo damage, after first absorbing under the name of recoupment the $13,083.33 awarded in the decree of the District Court to that interest.

Again submitting that the decree entered by the District Court follows categorically the mandate and opinion, we will consider the two elements of this question in their order.

First—Affirmative Decree, Pure and Simple.

In the form of decree presented on behalf of the New York, to which we may refer for illustration, the ruling consideration seemed to be to leave the New York liable for one-half the gross damage regardless of how the other half might be provided for. It required the New York to pay directly into court about one-half the cargo damage, being that represented by those cargo underwriters who intervened. It then commingled the damage awarded the Erie & Western Transportation Company in its own right with the cargo damage of those underwriters for whom the libelant continued to act as trustee, although the rights of all the cargo underwriters are identical before the law, and all stand in the same right.

It then provided that the Erie & Western Transportation Company, for itself and as such trustee, recover one-half of this amount, less one-half of the amount so to be paid directly by the New York and less one-half the New York's own damage, and that the resultant sum be paid into court or to the proctors for the Erie & Western Transportation Company. Without burdening the argument with the various amounts, the result is that there would be thus paid into court or to the proctors for the Erie & Western Transportation Company, a sum less by $6,651.28 than the amount of the cargo damage. This deficiency is unprovided for in the proposed decree and must so continue unless the District Court should of its own motion enter up a decree for that amount against some other party than the New York, notwithstanding the express holding of this court that they are entitled to recover their full damage against that vessel.

But dismissing the particular form of decree presented on behalf of the Petitioner, which clearly does not at all meet the requirements of the mandate and is only considered by way of illustration. It will not do either to commingle the cargo damage directed by this court to be decreed against the New York with the damage directly sustained by the New York and consider these two together as constituting her damage; there is no warrant for such a method. But this would make an aggregate of $43,811.03, and the damage of the Erie & Western Transportation Company in its own right being but $30,508.46, the only way in which the prayer of the petition could be carried out by this method would require the same distinctively affirmative decree for one-half the difference,

$6,651.28, against the Erie & Western Transportation Company or its steamer Conemaugh.

The underwriters on cargo never impleaded either the Conemaugh or the Erie & Western Transportation Company, nor was either impleaded in respect of this claim under Rule 59 or in any manner. The record exhibits the bill of lading referred to in the Respondent's return, which contains stipulations precluding a recovery of any of this damage by them against the Conemaugh or her owner. Clearly, for both or either of these reasons, no decree could be rendered in their behalf. But the Petitioner is in no better case. It has never made any claim for damages against either the Conemaugh or her owner. The Petitioner in its answer does not even refer to the cargo damage, it does not speak of the damages in the case generally; the only allusion in the answer to any damage whatever is contained in the statement that the New York was somewhat damaged about her stem. The cross-libel has already been considered. It was abandoned; its formal dismissal was not appealed from and it is effectually out of the case. But even in that pleading the Petitioner made no mention whatever either of cargo damage or of damage generally by the collision, but in a brief paragraph mentioned the damage to the New York and stated the amount. Subsequently, however, we stipulated the amount of this damage, and it was before the court, if at all, by the allusion to such damage in the answer and our consenting that it be considered, without which, even that element of damage might not have been considered by the court.

The Sapphire, 18 Wall., 51-56.

The admiralty is not without rules of procedure and standards of practice. In a case where by agreement of the parties the answer was to stand as a cross-libel, this court said :

> "Respondents in a pending libel have the right, in a proper "case, to institute a cross-libel to recover damages against the "libelants in the primary suit; but they should file their libel, "take out process, and have it served in the usual way; and "when that is done, the libelants in the first suit regularly "become respondents in the cross-libel, and, as such, they must "answer or stand the consequences of default. Regularity in "pleading is both convenient and essential in judicial investiga- "tions, and such departures from the usual practice as are "exhibited in this record ought not to receive countenance."

Ward vs. Chamberlin, 21 How., 572-574.

There being no cross-libel and Petitioner not having set up this damage or referred to it in its answer, it cannot have an affirmative decree.

The Dove, 91 U. S., 381-384.
Kennedy vs. Dodge, 1 Ben., 311 F. C., 7701.

"In a libel for collision the respondent cannot obtain a decree "for damages in excess of those sustained by the libelant, "unless he has filed a cross-libel."

Ebert vs. The Reuben Doud, 3 Fed., 520.
Gillingham vs. Charleston Towboat Co., 40 Fed., 649-651.
The Ciampa Emilia, 39 Fed., 126.

The function of a cross-libel in admiralty is very similar to that of a cross-bill in equity, without it affirmative relief cannot be given.

Washington Railroad vs. Bradleys, 10 Wall., 299.
Wood vs. Collins, 60 Fed., 139.
White vs. Bower, 48 Fed., 186.

Manifestly, under the pleadings, Respondent could not enter a decree calling on the Erie & Western Transportation Company to pay to cargo underwriters $6,651.28, or to pay that sum to Petitioner, as would be necessary if the cargo damage found due to the underwriters from the New York shall be treated *when paid* as part of the damage to the New York.

Second--Affirmative Relief by Way of Recoupment.

It is true that before the promulgation of Rule 59, there being no rule of practice which enabled the parties to bring before the court by appropriate pleadings all necessary parties and present and have heard all issues necessary to a full determination of the rights of the parties, the various courts, in order to avoid multiplicity of actions and protect the parties, undertook to work out the rights under a system of "rustic justice." The necessity for resorting in collision cases to any latent equity power of the court was entirely removed by the adoption of the 59 rule. Even before the adoption of that rule, exercising the authority given by the 46th rule, to regulate their own modes of procedure in the absence of specific provision by Congress or the Supreme Court, it will be found that the courts adopted and pursued this system, not only in the name but for the purposes of justice.

It will not be found that affirmative relief by way of recoupment or otherwise was given to a party who submitted no claim of any sort, but stood upon a simple denial of liability until after hearing in a court of last resort, and then sought to assert such claim against another party who has a special defense thereto, but upon which he may not be heard.

The only case that we are aware of in which the precise question has been considered in this court is that of the *Beaconsfield*, which we think fully and definitely recognizes the force of the 59th rule.

The court said, p. 307 [158 U. S.]:

> "and in case he (the cargo owner) proceed against one only, "and both are held in fault, he may recover his entire damages "of the one sued. A person, who has suffered injury by the "joint action of two or more wrongdoers, may have his "remedy against all or either, subject, however, to the condi- "tion that satisfaction once obtained is a bar to any further "proceeding. The Atlas, 93 U. S., 302, 315; Lovejoy vs. "Murray, 3 Wall., 1. Did the case rest here, there could be "no doubt of the right of the libelant to recover the whole "damage to the cargo of the Britannia, although, as owner of "the Beaconsfield herself, Cleugh could recover only a moiety "of his damage to the vessel, in case the collision were ad- "judged to be the mutual fault of both vessels."

Then, after alluding to and considering Rule 59, which was complied with in that case, by the filing of such petition as we claim should have been filed in this case to predicate the right of recoupment, the court says (309):

> "Had no petition been filed against the Beaconsfield by the "French Company, the case would have stood quite differently, "and there would have been no suit against the Beaconsfield "upon which a decree could have been rendered."

The decree of this court in the present case that the cargo underwriters are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision, stands upon the same principle. After quoting (175 U. S., 210) from the case of *The Atlas*, language supporting the proposition that a plaintiff suffering a loss by the negligence of two parties, is at liberty to sue both or either, and if without fault is entitled to judgment in either case for the full

amount of his loss, the Court further quotes with approval from the same case :

> "Co-wrongdoers not parties to the suit cannot be decreed to "pay any portion of the damage adjudged to the libelant, nor "is it a question in this case whether the parties defeated may "have process to compel the other wrongdoers to appear and "respond to the alleged wrongful act."

In support of this proposition the Court also refers to the case of

The Juniata, 93 U. S., 337.

There Pursglove filed his libel against the Juniata for damage to his tug and for personal injuries ; the United States also libeled the Juniata. Both the Juniata and the tug were held in fault. Pursglove recovered half his damages, property and personal, against the Juniata ; the United States being without fault recovered full damages against the Juniata. Although Pursglove was before the court suing and had decree against the Juniata, yet, as neither he nor his tug had been made a party to the claim of the United States, this Court there required the claimants of the Juniata to pay the full damage to the United States, and on the question of claimants' right to recoup or have such relief as petitioner is here seeking, said (340):

> "Whatever their rights may be against Pursglove, by reason "of such payment of more than one-half, must be settled in "another proceeding. It cannot be done in this litigation."

We submit, therefore, that the prayer of the petition for a division or other decree than such as was rendered would be contrary to established law and contrary to the explicit directions of the Court in this case.

To apply the sum awarded the Erie & Western Transportation Company in its own right as a credit on the sum to be paid by the New York under the decree of this court, is unwarranted.

The difficulty with the contention of the Petitioner throughout is that the case has never been put in a position for accomplishing or warranting this kind of relief, and under the particular facts, as shown in the record and the return, no such result can be accomplished without grave injustice to the Erie & Western Transportation Company.

To give affirmative relief against the Erie & Western Trans-

portation Company on a claim as to which, without fault on its part, it has not had its day in court, or to take its property to satisfy such claim in whole or in part, would violate the company's constitutional right. It may not be deprived of its property without due process of law.

Whatever difficulties there may have been before the 59th Rule, and however the courts may have been required then to work out the equities of the parties, since its adoption the difficulties are met and the practice certain.

That rule prescribes a definite course of procedure, to bring every claim and issue and, if necessary, other parties before the court, with opportunity to set up any and all pertinent claims and defenses and have complete adjudication of the rights of all concerned.

Besides some cases in the lower courts in which the equities were worked out before the rule was adopted and which will be briefly considered later, the brief for Petitioner refers to two cases in this court :

The North Star, 106 U. S., 17, and
The Chattahoochee, 173 U. S., 540.

To these may be added for this consideration,

The Manitoba,, 122 U. S.

These cases have no bearing whatever on this case. In each the party against whom recoupment would operate invoked the protection of a public statute, and by that act by operation of the law, made himself and any reclamation claim arising from the disaster *party defendant* in the case as to all the damages, or as to the particular claim, with fullest opportunity to present any special or other defense, and asked the court for final and complete adjudication of every question so that the resulting decree should be conclusive upon all parties.

Referring, however, to the cases specifically. The question in the *North Star* was, When can a party thus invoking the benefit of the act have it applied to his liability, before or after that liability is adjusted upon such full consideration of the particular facts in the case as shall enable the court to fix the *ultimate* liability of the party ? It was not necessary to consider any

such question as we have in this case, because by his own act in invoking the aid of the statute, the party had brought into the case every issue, the determination of which was necessary to the ascertainment of such ultimate liability.

In the *North Star* case there was no question of cargo damage. This came up for consideration in the case of the *Manitoba*, but aside from the consideration above stated, such a question as we have here could not arise. The *Manitoba*, under the decree of the District Court and as affirmed, was held liable for one-half of the total damage. There was no occasion for any recoupment, because the bond given on her release in the limited liability proceeding was less than a *moiety* of the damages in the case, and a decree was rendered for the amount of the bond.

The case of the *Chattahoochee* is a similar authority. It also states the broad general principle of division of damages. The precise manner in which the question was brought before the District Court does not appear, but it does appear that in the course of the proceedings in the District Court the libelant himself at some stage of the trial and before final decree presented to that court for adjudication a question, the elements of which are these :

Both vessels are found in fault ; here is cargo damage as well as damage to the schooner; under the general law, the schooner would be held to pay one-half the cargo damage, which, the schooner having been lost, might be deducted from the recovery for her own damage ; but the Harter act exonerates the carrying vessel from this liability, and the cargo owner must forego this *moiety* of his loss unless, perhaps, the steamer should pay the whole. The limited liability act was also referred to.

Here were of necessity presented every question and every element of every question necessary to the full and final disposition of all the rights, affirmative and defensive, between the cargo owner and the owners of both ships in such manner that the decision of the court thereupon must be final and conclusive as to all the parties. In what particular manner they were thus presented is immaterial to any question that he might raise on the subject. Therefore, in this case, as in the other cases, we find no consideration of the question raised here.

Clearly, when a party has thus had his day in court upon the question of the cargo claim and its effect upon him, he cannot be

heard to complain that the trial court did decide upon this essential element of the case presented. In each of these cases the very thing happened which we assert is necessary before a person's property may be taken to pay a claim; to wit: that the party to be charged be given an opportunity to present any defense he may have to that claim.

Of the earlier cases cited in Petitioner's brief, perhaps the strongest is

The Eleanora, 17 Blatchf., 88, F. C., 4335,

where two separate libels were filed, one for the vessel, the other for the cargo; both vessels were held at fault. In delivering the opinion, Chief Justice Waite, on circuit, said:

> "Both vessels being in fault, as between themselves, the "damages must be apportioned. Castner and others, who sue "the Eleanora alone for the cargo, are entitled, under the rule "in this case of The Atlas, 93 U. S., 302, to a decree for the "full amount of their loss; and, as the Transit, if she had "been joined, would have been liable for one-half this loss, a "credit may be allowed the Eleanora, on the decree in favor of "the owners of the Transit, for a sum equal to one-half of the "damages to the cargo. Although separate libels were filed by "the owners of the vessel and the owners of the cargo, they "constitute, in effect, but a single suit. They have been heard "together and submitted on the same evidence. Having all "parties before it, *the court may do what it would have done "if there had been but one libel, that is to say*, divide the dam- "ages of the collision throughout between the two colliding "vessels. A formal claim, to that effect, on the part of the "Eleanora, is not necessary. It is rare that, in any case, a "defending vessel makes a demand for a division of damages. "A complete defense is generally insisted upon in the plead- "ings, and the apportionment is made by the court, on the "facts as they are finally developed at the hearing. It is un- "necessary to decide what the rule in this particular would be "if the Eleanora had not been subjected in the suit for the cargo, "because here she has been, and that, too, upon the very tes- "timony submitted in the suit between the two vessels. The "fund belonging to the Transit, growing out of the collision, "is in court, and *no injustice is done* by using it to re-imburse "the Eleanora for what she had paid for the Transit, on ac- "count of the mutual fault of the two vessels."

In this case it would almost seem that the Chief Justice had the impression that if the claim for the cargo damage and for damage to the carrying vessel were presented in the same libel, they became amalgamated into one claim, subject to the same limitations.

In The C. H. Foster, 1 Fed., 733,

in which limitation of liability was also involved, the cargo damage was ordered paid into court first, and then, a decree entered which should show that one-half that sum was included in the damage of the ship paying, with leave to amend the libel setting up that damage if the parties thought desirable.

In The Hercules, 20 Fed., 205,

Judge Lowell, recognizing that the carrying ship might have a defense against the claim of its cargo owner, if it were charged with that damage, said :

> "It is true that the question whether the schooner is excused "from liability to the owners of the cargo shipped on board of "her, has not been brought into the case ; and, therefore, if "there is any ground for relieving the owners of this liability, "they may show it by supplementary proceedings in the "cause. If they shall make no move in that direction within "30 days, the decree will be that the claimants have the right "to recoup from the damages found against them, and in "behalf of the owners of the schooner, one-half of the amount "found due the owners of the cargo."

Judge Lowell, by such order, gave to the carrying ship the right she is entitled to—opportunity to defend.

Treating these cases in a group. The decisions formulating the right were made before the promulgation of the 59th Rule. The later ones are on the authority of these without consideration. As before stated, this system was employed in the interests of justice. In no one of these, nor in any case cited in Petitioner's brief do we find that the court adjudicated the claim of the carrying ship's cargo against that ship any more than against the other offending ship or against any third party without giving such party an opportunity to be heard on the question of his liability.

It was doubtless to correct this deficiency in the admiralty procedure and to avoid the haphazard disposition of this question that the 59th Rule was adopted, furnishing a standard of practice and procedure competent to bring the question in an orderly way before the court. Rule 46 as well as section 918, Rev. St., provides that the Circuit and District Courts have power to regulate their practice and procedure only in those respects in which it is not controlled and regulated by statute or rule of the Supreme Court. The necessary result of this is that where the Supreme Court does by rule establish and command a certain course of procedure, any other is excluded.

Speaking of these rules, this Court said :

> " They are little more than a recognition and formulation of " the previous practice of courts of admiralty in this country " and in England. They have come before this court in several " instances and have always been treated as obligatory."
>
> *The Corsair, 145 U. S., 335, 342.*

It was held by Judge Wilkins that where these rules prescribe a course they are exclusive of any other.

> *The Illinois, Brown's Adm., 13; F. C., No. 7003.*

We can only understand the expressions of the court in *The Beaconsfield* as stating this doctrine. In that case the claim was by the owner of the carrying ship for damage to the ship in his own right and as trustee for the cargo owners. The original claimant of the ship proceeded against filed a petition in conformity with Rule 59 to bring in the libelant's vessel, the *Beaconsfield*, as a defendant to the claim asserted as trustee for the cargo owner. In this connection the court said, p. 309 :

> " When the Beaconsfield was drawn into the litigation by " the petition of the French company, and his own vessel thus " made to respond to his libel, Cotton should have either with- " drawn from the suit, and asked that Sanbern be substituted, " or in his answer to the petition of the French company " should at least have set up any defense he might have had " against the owner of the cargo, arising under the bill of lading " or from any other cause. If the attention of the court had then " been drawn to the fact that Cotton was occupying inconsis- " tent positions, it would doubtless have ordered the owner of

"the cargo to be substituted for him as libelant. Had no "petition been filed against the Beaconsfield by the French "company, the case would have stood quite differently, as "there would have been no suit against the Beaconsfield upon "which a decree could have been rendered."

This is the present case; no petition was filed, and libelant recovers full damages for its *cestuis que trust*, underwriters on cargo, but by reason of its fault, only a *moiety* of its own damage. There is no suit against the Conemaugh or her owner in which a decree can be rendered. If the Petitioner, as claimant of the New York, has any claim against the Conemaugh or her owner by reason of her payment of cargo damage, having failed to put itself in a position to determine that here, it must be relegated to a separate action.

We submit that the reasons set up in the return for not entering the decree prayed for in the Petition herein are sufficient, and the petition should be dismissed.

Respectfully submitted,

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S. H. HOLDING,
FRANK S. MASTEN,
Of Counsel.

Cleveland, O., May 15, 1900.